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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

TNT AMUSEMENTS, INC,)
)
Plaintiff,)
)
vs.) Cause No.4:23CV-330JAR
)
TORCH ELECTRONICS, LLC et al.,)
)
Defendant.)

MOTION HEARING

BEFORE THE HONORABLE JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

February 21, 2024

APPEARANCES

For Plaintiff:

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FEBRUARY 21, 2024

(The proceedings commenced at 3:38 p.m.)

THE COURT: We are here and on the record in the case of TNT Amusements Incorporated versus Torch Electronics LLC, et al. It is cause number 4:23CV-330.

The record should reflect on behalf of TNT Amusements, they appear by counsel Rich Finneran, Mary Grace Warren, and Zoe Brannon. Do you go by Wolkowitz-Brannon or Brannon?

MS. WOLKOWITZ-BRANNON: wolkowitz-Brannon.

THE COURT: Okay. I'll try to remember that. The Defendant, Torch Electronics, appears by counsel Aaron Craig and Todd Graves.

We are here today to take up certain matters. I just want to say for everybody's sake, I understand there are a lot of things pending. There is a motion to dismiss. There is a motion for partial summary judgment. There are a number of issues that are pending in this case.

Having said that, when I saw the motions to compel, I thought it was important that we have this hearing, meet, because I want to make sure that I get you something on the motions to compel, because I want to continue to move with the case. We have a case management order in place. We have a trial setting of April 15th. The dispositive motion deadline has passed. I know there is still some briefing I

1 believe that's -- and that may be completed.

2 MR. CRAIG: I think it is fully-briefed now, your
3 Honor.

4 THE COURT: Okay. In any event, I understand that
5 there are a number of matters for the Court to rule on, and I
6 intend to do that. But I wanted to meet to take up the
7 issues about the motions to compel.

8 It is, in my view, important that I get very
9 concise reports from you on what is still at issue on the
10 motions to compel, and how we can resolve those so that we
11 can move forward with the case. Motions to compel many times
12 are very difficult for the Court to determine, because a lot
13 of times people are saying well you did this. We did this.
14 And I'm trying to sort through all of that, and I need you to
15 very clearly, concisely, briefly tell me what the issue is,
16 and what you are asking for from the Court, and then I'm
17 going to give the other side an opportunity to respond to
18 that.

19 But again, I want even the response to be brief,
20 concise, and to the point. So that's the situation that we
21 are in.

22 So the first motion to compel that I want to take
23 up is TNT's motion to compel as it relates to the testimony
24 of Nick Farley. Mr. Finneran, I don't know who is speaking
25 on behalf of TNT, but whoever is speaking -- and I know you

1 have your laptops going with the -- okay.

2 MR. FINNERAN: Your Honor, I will --

3 THE COURT: I should note my law clerk, Sarah
4 Koppenaar, is in the jury box. So we are turning on the
5 monitor so that she can see the exhibit as well. Go ahead,
6 Mr. Finneran.

7 MR. FINNERAN: I was going to mention that if we
8 are going to take the Farley motion first, I may take my
9 slides out of order a little bit.

10 THE COURT: Tell me, which motion do you want to
11 talk about first?

12 MR. FINNERAN: I have the Miltenberger 30(b)(6)
13 motion to compel first on my order but.

14 THE COURT: Any objection to taking that up first?

15 MR. CRAIG: No, your Honor.

16 THE COURT: Go ahead.

17 MR. FINNERAN: Your Honor, I think they both
18 present sort of an overlapping issue, and before I get into
19 it, I do want to compliment opposing counsel on resolving
20 many other issues that we had in the course of discovery.
21 These are the only two lingering ones from our side that
22 unfortunately required the Court's intervention.

23 And so both of these motions basically concern the
24 same issue, which is the refusal of the Defendants on the one
25 hand, and its expert on the other hand, to answer what we

1 consider fairly basic questions about the function of the
2 Torch devices that are the central issue in this case.

3 As the Court I think knows, one of the big issues
4 under our complaint in this case is whether the Torch devices
5 involve any element of chance. That is a critical
6 determination among others under Missouri law as to whether
7 or not they are illegal gaming devices.

8 In this both of these examples, what we are seeking
9 is to require Mr. Farley on the one hand, and
10 Mr. Miltenberger or any other representative of Torch on the
11 other hand, to answer questions about that particular topic.
12 And in one case, those questions were put to Mr. Farley. He
13 refused to answer them. In the other case, the questions
14 were put to Mr. Miltenberger, and he claimed not to know the
15 answers, despite it being a 30(b)(6) when that topic was
16 noticed.

17 So I know you asked us to be concise. I'll try to
18 do so without skipping important points. Starting with
19 Torch's failure to prepare for its 30(b)(6), I think the
20 easiest thing to look at to see how Torch was deficient in
21 its preparation is to look at the document I put on the
22 screen here, which is exhibits where we introduced in
23 Mr. Miltenberger's personal deposition. It is an excerpt of
24 Torch's website from September 13, 2022, and we asked
25 Mr. Miltenberger in that original personal deposition if he

1 knew whether this was language from the website, who authored
2 that language, whether he was part of it. In each case, he
3 said he didn't remember, which is a fair answer in a personal
4 deposition if you have failure of recollection.

5 But after that, we noticed Mr. Miltenberger --
6 well, we noticed Torch for a deposition, and among the topics
7 was the changes in reasons, for such changes, to any
8 representations on any website owned or operated by Torch.
9 And the only objection that Torch made to that notice topic
10 was that to the extent the questions call for privileged
11 information, the witness would be instructed not to answer.

12 As you can see here in purple, I said I understood,
13 and then we moved forward with the deposition. But at the
14 corporate deposition, Mr. Miltenberger was asked the very
15 same questions, expressed a failure of recollection, and when
16 I asked whether or not he had taken any steps since his
17 deposition in December to determine who wrote the text and
18 what the changes were, he indicated that he had none.

19 The other thing about the website that is important
20 is it contains a number of representations that are among the
21 commercial representations that we claim were false in this
22 case, and I have highlighted a few of them here. The Court
23 can read them. I'm also happy to send these slides after, so
24 we cannot spend too much time staring at this, but among
25 other things you can see here that Torch made representations

1 to the public on its website about how Torch's no chance
2 games -- the priority software behind Torch's no chance games
3 -- ensures that each game outcome is predetermined and in
4 sequence; and therefore, there is no chance of an unexpected
5 outcome.

6 These were commercial representations that as
7 recently as September of 2022, Torch was making. These
8 statements were actually removed from Torch's website some
9 time later in 2022, but there are things that were at one
10 time within Torch's corporate knowledge. Yet, at the
11 deposition on January 9th, when asked questions about these
12 representations, Mr. Miltenberger again claimed that he did
13 not know whether, for example, the devices had a sequential
14 list of outcomes and whether the games cycle through those
15 outcomes.

16 That's especially concerning from our prospective,
17 because three weeks earlier in his personal deposition,
18 Mr. Miltenberger did recall how the machines worked, and you
19 can see here on the screen -- and I won't read it into the
20 record -- but he gave a fairly detailed explanation of how
21 the machines worked. Yet somehow his knowledge went into the
22 wrong direction between his personal and corporate
23 deposition, so as now that he had claimed to have a lack of
24 knowledge, when in fact, if he had any obligation, it was to
25 inform himself of these issues between his personal and the

1 corporate deposition.

2 Now, we only have the responses from one other
3 yesterday. We are playing catch up a little bit in
4 responding to those points, but one point that Mr. Craig
5 raised in his response was that essentially some of these
6 items asked were expert testimony. And first, we would say
7 that merely because something is expert testimony, or it
8 might be susceptible to expert testimony, does not mean it is
9 also not within the corporate knowledge of Torch Electronics.

10 Mr. Miltenberger, in fact, admits that he received
11 reports from an expert, Nick Farley, describing these
12 devices, but as you will see in a moment, he said he did not
13 review or read those reports in preparation for his
14 deposition, but many of the questions I asked -- or Mr. Potts
15 asked in this case -- were not about anything technical about
16 the devices. It was about just how they work. What range of
17 payouts do the devices produce.

18 Mr. Miltenberger claimed he did not know. What is
19 the highest prize that can be produced. What is the lowest.
20 He claimed not to know. And then when asked even the very
21 basic question of what are some examples of the games on the
22 devices that are the central issue in this litigation,
23 Mr. Miltenberger said he did not know.

24 Our exhibit to our motion to compel, including the
25 examples where Mr. Miltenberger expressed a failure of

1 recollection in his 30(b)(6) deposition, spans more than 50
2 pages, and the coverings of a great number of topics that
3 were noticed in advance of the deposition.

4 THE COURT: So let me ask you, as I understand it,
5 you noticed the deposition. Then there were e-mail exchanges
6 between you and Mr. Craig or counsel.

7 MR. FINNERAN: Mr. Craig.

8 THE COURT: About -- it seemed to me to be limiting
9 some of the topics, and the argument that is being made is
10 that, well, you went beyond the agreement as to what topics
11 would be covered.

12 Again, from the Court's standpoint, for me to sift
13 through that and try to determine, okay, what did you agree
14 to limit. To what extent did Mr. Miltenberger not meet what
15 would be necessary for a 30(b)(6) witness, that's difficult
16 to say.

17 what are you asking me to do with regard to
18 Mr. Miltenberger. Do you want me to order him to be produced
19 to re-depose, and ask him on certain subjects, and have you
20 identified those subjects for Mr. Craig?

21 MR. FINNERAN: Yes, your Honor. So first of all,
22 the two topics that I'm discussing in my presentation today
23 are two topics where the only objection raised was to the
24 extent it called for privileged communications. So you are
25 right in his response, Mr. Craig provided the correspondence

1 that he had had. I have a chart. We can go through it
2 one-by-one if we have to, but it may be better suited for us
3 to do in a reply after today's hearing for the other topics.
4 But topics were ones where there was no agreement to limit
5 the scope of his testimony.

6 Mr. Craig did assert an objection on the basis of
7 privilege, but that was the objection that was raised. And
8 so in each of these two topics, 25 and 35, that's the only
9 limitation that was even suggested by Mr. Craig and agreed to
10 by TNT.

11 In terms of what we are asking for, we would ask
12 the Court to order Mr. Miltenberger to sit for another
13 deposition. Our motion identifies the topics that we believe
14 that Mr. Miltenberger was --

15 THE COURT: What topics?

16 MR. FINNERAN: I believe it is approximately 10
17 topics that we have indicated. Let's see, 2, 3, 10 topics,
18 so we have 10 topics, your Honor, that were identified in the
19 motion where we believe that his answers and responses were
20 deficient, and we believe that even in light of the
21 agreements that we reached with Mr. Craig to limit some of
22 those topics.

23 Again, if the Court is inclined to entertain and
24 grant our motion, I expect we would be happy to provide any
25 detailed account of responses to Mr. Craig's arguments in his

1 response. I can do so orally today, if the Court would like,
2 but that might take more time than we would want to take to
3 do it.

4 THE COURT: How long was the deposition of
5 Mr. Miltenberger, if you know?

6 MR. FINNERAN: His personal deposition, I don't
7 recall.

8 THE COURT: 30(b)(6).

9 MR. FINNERAN: 30(b)(6), I'm sure it was less than
10 seven hours, but I --

11 MR. CRAIG: Seven hours and 45 minutes from start
12 to finish, but we took a lunch break. So I don't know on the
13 record count, but it was slightly less than eight hours
14 total, your Honor.

15 THE COURT: Just -- that's Mr. Craig on behalf of
16 Torch.

17 MR. FINNERAN: The other example, your Honor,
18 though that I wanted to point out is Torch's relationship and
19 communication with Nick Farley, which we will talk about in a
20 moment. That was another notice topic. As you can see, the
21 only objection was on privilege grounds, as said, we will
22 ask. You can strike the answer to the extent you can. They
23 filed the rule of privilege, and in this example, again
24 Mr. Miltenberger expressed a failure of recollection in terms
25 of just even how long has Torch had a business relationship.

1 I don't know. How much has Torch paid Mr. Farley. I don't
2 know. And when I asked if he has reviewed any of
3 Mr. Farley's reports, he said he didn't remember doing so in
4 advance of the deposition.

5 So those are my remarks on Mr. Miltenberger's
6 motion. I'm happy to cover Mr. Farley's, or if you'd like
7 to hear the --

8 THE COURT: You may as well -- or tell me what.

9 MR. CRAIG: I mean, if you don't mind, I might
10 rebut those, because Farley is a different animal, in my
11 opinion.

12 THE COURT: All right, let's just take up the --
13 Mr. Craig, you can pull out the side.

14 MR. CRAIG: One second, your Honor. Okay, your
15 Honor, may it please the Court. So we have heard about
16 Mr. Miltenberger's 30(b)(6) deposition. Yeah, I don't have
17 an exact count of the hours on the record, but it was really
18 close to seven, and then also there was no -- there were no
19 objections at the time, or that this was something we needed
20 to call the Court about. That this was problematic. That we
21 are going to hold the deposition open.

22 The first time that I heard about any of these
23 problems it was 10 days after the deposition. It was another
24 17 -- something like that -- before the motions got filed, I
25 believe. But I don't see things quite as Mr. Finneran does.

1 I will say --

2 THE COURT: That's not necessarily shocking to me.

3 MR. CRAIG: Exactly. I will say that that's
4 probably not shocking to the Court. I will just say thank
5 you to Mr. Finneran. We have been able to meet and agree on
6 a lot of discovery issues, and we have narrowed them down
7 significantly.

8 But in our opinion, TNT's motion to compel Torch is
9 by and large focused on frankly poorly-asked questions. This
10 was not Mr. Finneran. This was another attorney named
11 Jonathan Potts, who came in kind of after the fact to do a
12 pretty important deposition of a corporate witness that was
13 one of the last ones in this case.

14 THE COURT: Here is the thing, the questions and
15 the answers that Mr. Finneran just brought up.

16 MR. CRAIG: Sure.

17 THE COURT: Those are matters that a 30(b)(6)
18 witness would be expected to be able to answer, and a
19 30(b)(6) witness, when you put forth that witness, they have
20 to be prepared to answer on behalf of the entity, the
21 corporation. And it just seems to me that those are such
22 basic topics and basic issues, they can't just come in and
23 say well, I didn't look at the underlying documents, or I
24 don't know. That's just not sufficient for a 30(b)(6)
25 witness.

1 To say, I understand from the response that you
2 don't agree with some of the things that Mr. Finneran is
3 saying; but again, just it is clear to me that the witness
4 was not prepared to answer on behalf of the entity.

5 MR. CRAIG: On those particular issues, your Honor,
6 and if you would let me --

7 THE COURT: Those particular issues, and there are
8 some other issues as well. There is some -- okay, I grant
9 you perhaps a 30(b)(6) witness wouldn't necessarily know, and
10 I understand that you assert a privilege at some point or a
11 couple of points. I'm not quite sure what that privilege is
12 that you are asserting there.

13 In any event, I guess my concern is it does appear
14 to me that there is a basis for me to order a continuation of
15 a 30(b)(6) depo. The issue in my mind is okay what topics am
16 I going to order you to cover.

17 MR. CRAIG: Yeah.

18 THE COURT: And in what respect am I going to order
19 that deposition to go forward. I'm not planning on entering
20 an order that says they can just do an entirely new 30(b)(6)
21 deposition.

22 MR. CRAIG: We definitely appreciate that.

23 THE COURT: That's not my intent. But I need an
24 informed way of determining what topics can be covered in the
25 continuation of that 30(b)(6) deposition. Tell me how do I

1 arrive at that.

2 MR. CRAIG: So on top of 18, which is one I think
3 the discussion was a critical element of their case is
4 whether Torch devices involve an element of chance, right.
5 And there is an underlying disagreement about necessarily
6 what that means. An element of chance is defined in the law.
7 That's a legal term of art here that's defined under Missouri
8 Statutes 572.010.

9 THE COURT: Okay. What's the point?

10 MR. CRAIG: The point is that a lot of the topics
11 that related to how the devices operate allegedly, those are
12 topics specifically for expert witnesses, and that is an
13 objection that I made over and over.

14 THE COURT: How it operates. It may be true that
15 to ask a 30(b)(6) witness "Does your device involve an
16 element of chance." I guess I would accept that there is an
17 argument that that's a legal conclusion. But in other
18 respects in terms of what gains there are, or what the payout
19 is or what. Those are not expert opinions. Those are just
20 facts.

21 MR. CRAIG: Well, what the games are, that is, in
22 my opinion, a question problem where the question was not
23 great.

24 THE COURT: How can that possibly be a legal issue,
25 or a legal question, or a problem at all. I mean, the games

1 are what the games are.

2 MR. CRAIG: Well, we are talking about multiple
3 devices that go back to 2014, your Honor. So for there to be
4 just a general question about what games are on the devices,
5 on all of your devices, to have an -- to have
6 Mr. Miltenberger --

7 THE COURT: How many different versions of the
8 machines are there going back to 2014?

9 MR. CRAIG: I don't have that information right off
10 the top of my head, but I mean, it is.

11 THE COURT: Are we talking about 10, or are we
12 talking about a thousand?

13 MR. CRAIG: We talking around 10, and each one
14 would have a suite of games that are approximately six or so
15 game suites.

16 THE COURT: That's 60 games.

17 MR. CRAIG: That's fine, and if your Honor wants to
18 -- I mean, frankly, I think we can probably do that by giving
19 them a list, and we can see if the list of the actual names
20 of the games, that's probably not at issue. But it was a
21 high-level topic, and I think what they wanted, and what they
22 will probably try to do, if they get an opportunity, is to
23 ask him more specific questions about how does this
24 particular game work. How does this particular game work.
25 And then -- and that is a little bit a different animal, but

1 as far as --

2 THE COURT: Mr. Craig, you are talking about what
3 you think that they were going to try to get to, and you may
4 be right that that's what they were going to get to, and if
5 the 30(b)(6) witness said, "well, I don't know how each of
6 these individual games works." I'd say, okay, I understand
7 that. They may not know how all 60 games work. But to just
8 say "I don't know" is unacceptable.

9 That's just not what you would expect from a
10 30(b)(6) witness who is speaking on behalf of the entity,
11 speaking on behalf of the corporation with corporate
12 knowledge. That's just not acceptable.

13 MR. CRAIG: So I don't necessarily disagree with
14 you on the point of what a lay witness can know by looking at
15 a list of games, right, but I think where the biggest problem
16 is -- where I have the demarkation between what they are
17 asking for, and I think what you highlighted, which is fair,
18 and we have given a list of these are the game names for all
19 of the games, and then if they want to ask them, you know,
20 specific questions about well what's this game name, theme,
21 right, that's fine, because a person who is looking at that,
22 even away, could describe the user interface as far as how it
23 works and that sort of thing.

24 The bigger problem, and the thing that they really
25 want is for Mr. Miltenberger, who is not a computer science

1 expert, has no background, and neither does anyone else in
2 Torch. what they really want is somebody from Torch to come
3 in and say, your devices on a software code level, they
4 operate like this. They operate like that. And that's clear
5 from some of the examples of questions that they have
6 highlighted on page four of their deposition. whether Torch
7 devices have a finite list of payouts, the predetermined --
8 the way the games predetermined outcomes. Like that is why
9 we have hired Nick Farley as an expert, because Torch doesn't
10 have an internal expert, and as much as they want to try to
11 make Nick Farley's report in this case and his opinions for
12 litigation purposes some sort of corporate knowledge on
13 behalf of Torch, that's not something that Mr. Miltenberger,
14 or anybody else as a corporate representative knows, right.
15 There is a difference.

16 They had an opportunity to do it, and they did put
17 in as an exhibit Nick Farley's report, and I have had
18 conversations with Mr. Finneran beforehand, and I said, look
19 do you want to ask him -- if you want to ask him if he has
20 opinions about Nick Farley's opinions, that's one thing. If
21 you want to ask him does he know how these devices operate on
22 an expert computer software code level, whatever. How do
23 they actually function internally, right, beyond what
24 somebody could just look. How does it operate when I play
25 the device. That's expert testimony. That is not something

1 that is proper for a corporation to be forced to do, and that
2 is really the only thing I'm concerned about as far as
3 limiting.

4 If there are factual issues that you believe
5 Mr. Miltenberger should have prepared for, as far as the
6 games, the name of the games, we can supply that information.
7 I think we can work through that, but that is not my concern.
8 It is that they want to put Nick Farley's words and his
9 opinions about how the Torch devices operate that he gave in
10 this litigation, and for purposes of litigation, in the mouth
11 of a corporate representative for Torch, and I believe that's
12 part and parcel to -- another major underlying problem here
13 is they have their own expert, Stacy Friedman, who TNT did
14 not ask to do an independent evaluation of any Torch device.

15 THE COURT: We are going a bit away from --

16 MR. CRAIG: Sure, but that is the reason that --

17 THE COURT: -- we are talking about
18 Mr. Miltenberger.

19 MR. CRAIG: That is the reason why they want to put
20 Nick Farley's expert testimony in the mouth.

21 THE COURT: But that's a separate issue. I'm
22 talking about Mr. Miltenberger. Mr. Miltenberger is the CEO
23 of Torch, correct?

24 MR. CRAIG: Correct.

25 THE COURT: He has to have basic understanding

1 about what they do and about what their machines do.

2 MR. CRAIG: I think he can have a basic
3 understanding, yes, on a lay witness. But what they can't
4 make him do, I believe, is turn him into an expert based on
5 the testimony.

6 THE COURT: I believe that they can't make him
7 answer questions about the underlying software involved.

8 MR. CRAIG: Right.

9 THE COURT: But he knows how these machines work.
10 He knows what happens. Quite frankly, I have never seen one
11 of these machines, so I'm assuming you put a quarter in, and
12 you push a button.

13 MR. CRAIG: Not exactly. It is more complicated
14 than that.

15 THE COURT: All right.

16 MR. CRAIG: There is a difference between I think
17 knowing something and having read somebody's opinions about
18 it. I think once you get a little bit further in the record,
19 right, if you ask four different experts about how the games
20 -- how the software and the computer side of these devices
21 work, you might get four different answers.

22 THE COURT: I'm not expecting him to know how the
23 software works.

24 MR. CRAIG: Okay.

25 THE COURT: I am expecting that a proper 30(b)(6)

1 witness would be able to testify about basic factual
2 information about the games on the devices.

3 MR. CRAIG: Fair.

4 THE COURT: The number of different devices there
5 have been over the years. The changes that have been made.
6 when those changes were made. He may know why the changes
7 were made. He would know the payouts. He is a businessman.

8 MR. CRAIG: That's fair. The changes that were
9 made to the games, that is a specific instance where we did
10 come to an agreement that Mr. Miltenberger wouldn't have to
11 go through 10,000 documents prior to his deposition, and come
12 up with those -- and so that is an instance where we had a
13 limitation, and the limitation was we will show up. We will
14 put documents that you produced in front of him to the extent
15 that you want to ask. And that's what happened on a lot of
16 cases here, and then they didn't ask --

17 THE COURT: It is clear to me that I'm going to
18 order a continuation of the 30(b)(6) deposition. Is
19 Mr. Miltenberger still going to be your 30(b)(6) witness?

20 MR. CRAIG: Yeah. It is himself and his wife.

21 THE COURT: Okay, that's fine. I assumed that was
22 right, but I thought I would go ahead and ask the question.

23 MR. CRAIG: Yep.

24 THE COURT: Tell me how you believe I should limit
25 that deposition.

1 MR. CRAIG: Well, I believe you should limit it to
2 the facts about -- I mean, if we are talking about just the
3 topic 18, and the functionality, or whatever. I believe that
4 should be limited to, as you said, factual information about
5 the actual games that are on the devices, and it should
6 exclude --

7 THE COURT: Let me go to a different issue. Mr.
8 Finneran brought up this issue about, you know, how much have
9 they paid Nick Farley.

10 MR. CRAIG: Well, I mean, we already disclosed what
11 they are entitled to on that, and that is part and parcel to
12 Nick Farley's expert disclosure where he says in this
13 litigation, he has been paid "X" amount.

14 THE COURT: The 30(b)(6) witness would know that.

15 MR. CRAIG: That's fine. I mean -- yeah, I guess
16 during the testimony, if they want to ask him how much we
17 have paid Nick Farley for the litigation in the case, I'll
18 make sure and prepare him.

19 THE COURT: I'm talking about the scope of this
20 deposition.

21 MR. CRAIG: Yeah.

22 THE COURT: And I'm saying to you that any factual
23 information about the company, the 30(b)(6) witness would be
24 expected to know that information, would have been expected
25 to review records to know relevant information as it relates

1 to this lawsuit.

2 MR. CRAIG: I do. I do agree with you. I also
3 think that -- and I just want to get this out there -- we
4 originally got 45 exceedingly broad topics, and then they got
5 narrowed down to 24, and then we limited them much more.
6 They were still very very broad. So like if it was me, I
7 probably would have -- and I wanted to know that question,
8 you know, and the answer, if I wanted to know an answer for
9 that question, which I wouldn't, because I have already got
10 it in writing from the expert how much money was paid so.
11 But if that was something that I wanted, I would have put it
12 in my 30(b)(6).

13 So while I'd say that, you know, yes, a 30(b)(6)
14 witness has an obligation to prepare, I objected to the
15 overbreadth, and then there is also limits on when there is
16 overbreadth, how much you have to prepare, right. That was
17 the specific question about a specific dollar amount that I
18 really don't think it was necessarily fair.

19 Now, I have no problem with him testifying about
20 it, again, but as far as preparedness, I'm not sure that
21 that's a primary example of lack of preparedness, your Honor.

22 THE COURT: Okay. Anything else you want to tell
23 me about how to limit the deposition?

24 MR. CRAIG: Well, I mean, there is a whole lot of,
25 you know, additional topics other than just --

1 THE COURT: I know there are.

2 MR. CRAIG: -- those two, and.

3 THE COURT: I'm just asking you, and I really do,
4 I'm intending on keeping this brief.

5 MR. CRAIG: Yeah.

6 THE COURT: So I just need to know, tell me how you
7 would propose that I limit the deposition.

8 MR. CRAIG: I think the only other area where I
9 would say I could find some common ground would be the
10 website. That testimony relating to the website -- I don't
11 -- I think Mr. Miltenberger can go back to his records and
12 work, and to the extent that there are records that are still
13 available about any communications that he had with the
14 website developer about changes to the website, I think we
15 can have him testify about that, your Honor. Other than
16 that --

17 THE COURT: Mr. Craig, here is the thing with that.
18 I mean, those changes to the website, they didn't happen
19 spontaneously. So I'm assuming Mr. Miltenberger, or his
20 wife, conveyed something to the website developer to say
21 change this. So somewhere those documents exist; and again,
22 I would expect the CEO, the 30(b)(6) representative of the
23 corporation, to be able to say how and why those changes were
24 made.

25 MR. CRAIG: That's fair. I mean, to the extent

1 that those are records that exist within -- it is also
2 possible that an attorney on behalf of Torch that I can't see
3 -- I don't see their documents -- maybe they were the ones
4 that communicated.

5 THE COURT: An attorney wouldn't have done that
6 spontaneously either.

7 MR. CRAIG: Oh, no, no -- I'm not saying -- I'm
8 saying we will try to find those communications with the
9 website developer, and I don't disagree that that's something
10 that potentially could have been done beforehand. So I agree
11 with you. That's an area where I think we have some
12 agreement.

13 Other than that though, your Honor, I don't think
14 -- I think the limitations that we have had prior and going
15 into this deposition, and the fact that they spent basically
16 their entire time with Mr. Miltenberger -- two days with
17 Mr. Miltenberger -- there are seven hours on the record
18 essentially. I don't believe any other topics should be
19 addressed.

20 THE COURT: Okay. All right, Mr. Finneran, real
21 quickly.

22 MR. FINNERAN: Yes, your Honor. So I think that if
23 we --

24 THE COURT: Why don't you come up here.

25 MR. FINNERAN: Yes, sir.

1 THE COURT: I guess before I actually just turn it
2 over to you, really what I'm focused on is this, I think you
3 are correct in some limited sense that there should be a
4 continuation of the 30(b)(6) deposition. The issue is how do
5 I limit it. So tell me briefly how you think I can limit it.

6 MR. FINNERAN: So, your Honor, first of all, I'm
7 happy to confer with Mr. Craig, and see if we can come to a
8 proposed order after the hearing, and that may be one way to
9 try to do it. We would say, you know, as Mr. Craig
10 mentioned, we noticed many more topics than these. We then
11 object on these topics. We believe if you look at page five
12 through --

13 THE COURT: But I have to tell you, you know, I
14 agree with Mr. Craig that the initial notice of deposition is
15 incredibly overbroad. It is just overbroad. There is no
16 other way to put it.

17 So I appreciate the fact that you all have worked
18 together in an effort to try to limit things, and I recognize
19 that. What I'm concerned about right now is an order that
20 limits this continuation of the deposition. So tell me how
21 you would propose that I would do that.

22 MR. FINNERAN: Well, your Honor, in addition to
23 having the broad topics, also in our motion we specified
24 individual questions that Mr. Miltenberger said he was unable
25 to answer, did not recall answering it. While I don't think

1 it would be fair to say that it is just those questions, and
2 an order that allowed us to ask those questions, and
3 reasonable followups from those questions, or things that
4 those questions serve as foundation for. That would be one
5 practical way to limit the deposition, but I think would be
6 acceptable to TNT.

7 The one thing I do note, and I want to raise, your
8 Honor, because I think it is going to be -- if we don't
9 resolve it today, the next thing we will be in front of you
10 talking about is really -- as Mr. Craig said -- where is the
11 line between what Mr. Miltenberger should be expected to know
12 as the corporate designee about the operation of the devices
13 that his company markets, sells, and he and his wife are the
14 only employees. This is the only thing they do is they sell
15 these devices.

16 But, of course, even if he somehow lacks knowledge,
17 which we know from communications he previously had this
18 knowledge, of whether the devices use finite lists, whether
19 there are random number generators. Those are facts, which
20 yes, it may require an expert to determine the truth of by
21 examining a device, but they are also facts that
22 Mr. Miltenberger and his company know, and we know they know,
23 and knew then, because he and his company on the website made
24 representations about how the devices work.

25 So obviously, you won't be there at the deposition

1 to rule about questions of what is or is not expert opinion,
2 but we don't think this should be limited nearly to what he
3 can see from looking at the device, rather we believe
4 anything that is within Torch's corporate knowledge about the
5 functions of the device, is something that he should be
6 required to testify about.

7 And so I think one can renounce that we may need to
8 do -- to have an order from this Court that sets forward good
9 limitations is that it is clear guidance as to where we draw
10 the line between what he is expected to prepare for or not
11 when it comes to the function of devices, which frankly is
12 the most -- that and the website I would say are the two most
13 significant topics that we think go very directly on the
14 merits of this case, and that Mr. Miltenberger has failed to
15 answer.

16 THE COURT: How long do you think this would take
17 to do with Mr. Miltenberger?

18 MR. FINNERAN: I would say, your Honor, if he is
19 un-evasive, we can do it in half a day. If it is -- if he
20 continues to claim lack of knowledge on things, obviously, it
21 could take longer. I don't anticipate it taking longer than
22 the seven hours that are typically permitted for a
23 deposition.

24 I should also note that in my client's case,
25 concerns were raised about Mr. Turntime's answers in his

1 corporate deposition, and we did, without seeking the Court's
2 intervention, produce him for a second corporate deposition
3 and a personal deposition, and he has been deposed for 16
4 plus hours.

5 So I don't think it is unfair in the circumstances
6 here that Mr. Miltenberger would be required to sit and to
7 answer these questions, which he was not prepared to answer
8 the last time.

9 THE COURT: Okay. Mr. Craig, just if you have
10 something very brief.

11 MR. CRAIG: Yeah, I mean, the 16 hours is a total.

12 THE COURT: I don't want to worry about 16 hours.
13 That's not --

14 MR. CRAIG: Well, yeah. It is personal and
15 corporate. So basically, they have 16 hours, and we have
16 basically the same with Mr. Miltenberger. But yeah, they
17 definitely don't need even half a day, your Honor. These are
18 questions that -- and topics that should be able to be
19 covered in 90 minutes.

20 And then secondarily, to the extent that Mr.
21 Finneran noted or asked the Court to just order
22 Mr. Miltenberger to respond to the specific bullet-pointed
23 questions and answers, I mean, I don't think that's
24 necessarily fair. A lot of those questions and answers
25 weren't great questions. There is many reasons why they are

1 objectionable. So yeah, I just -- I would caution -- I would
2 hope that that would not be where we are headed here.

3 As he has said, he has already addressed the two
4 biggest topics. It should be limited to that, and we are
5 already past the point of where all of the dispositive
6 motions are fully-briefed. All Daubert motions are
7 full-briefed. We are headed to trial. He can ask these
8 questions frankly from Mr. Miltenberger at trial and nothing
9 really changes.

10 THE COURT: Let's be realistic and fair, the
11 Federal Rules don't require him to discover this stuff at the
12 time of the trial.

13 MR. CRAIG: And I'm not saying --

14 THE COURT: That's not going to be the way we
15 proceed.

16 MR. CRAIG: No -- and I agree, but he is telling --
17 he has already told you what he really cares about, and that
18 should be the focus I think of the order here, your Honor.
19 And then the only other thing would be that the idea, you
20 know, of this expert corporate knowledge.

21 THE COURT: Here is what concerns me. I don't mean
22 to interrupt you, but I am going to do it.

23 MR. CRAIG: Sure.

24 THE COURT: What you are asking me to do is to
25 limit it to the facts.

1 MR. CRAIG: Yeah.

2 THE COURT: And I fear that you are not going to
3 agree on what's facts and what's opinion, but certainly
4 what's on the website, you know, if it appeared on a website,
5 I mean Mr. Miltenberger may not know the underlying thing
6 about whether or not -- well, I'm fearful of giving an
7 example.

8 MR. CRAIG: I know what you are saying. I do, and
9 I think that it is one thing for Mr. Miltenberger to say,
10 yes, I said that. Yes, Torch said that. That's the thing
11 Torch said. And then a followup question is that -- is that
12 still your opinion. Yes, it is my opinion, but my opinion is
13 different than that is, in fact, how it operates, because the
14 basis of those statements, those came from experts who looked
15 at it. So it is an opinion about an expert's opinion. You
16 see, that's the distinction.

17 I think one is very different than the other, and
18 all of the questions that I'm concerned about, they weren't
19 asking for Mr. Miltenberger's opinions about Nick Farley's
20 opinions about how the devices operate, right --

21 THE COURT: Okay.

22 MR. CRAIG: -- they are asking as a matter of fact,
23 is this how the games work, and he doesn't know.

24 THE COURT: I understand. Tell me about Nick
25 Farley.

1 MR. FINNERAN: Okay. For some reason, it looks
2 like I lost -- oh no, actually, it is just my fault. Sorry,
3 the connection got jarred. So let me try to fix this. I
4 apologize. My computer is mad, because it is trying to get
5 back online, but it can't do it. There we go.

6 THE COURT: While you are trying to pull that up,
7 let me go to you, Mr. Craig, am I correct you still intend to
8 call Nick Farley at trial; is that correct?

9 MR. CRAIG: I mean.

10 THE COURT: I'm asking you that, because if you are
11 not going to offer his opinions --

12 MR. CRAIG: Right.

13 THE COURT: -- then we are talking about an issue
14 that's a nonissue.

15 MR. CRAIG: So I think the issue that is a
16 nonissue, that is an issue. It is currently our position
17 that Nick Farley would be called as a rebuttal expert, which
18 he is, to the extent that he is necessary based on probably
19 some rulings that relate to their expert -- their affirmative
20 expert Stacy Friedman, but with regard to specifically the
21 questions that are at issue here about the code in this
22 device that is not a Torch device, but a Banilla device --

23 THE COURT: Again, when you say that, Banilla
24 manufacturers Torch's devices.

25 MR. CRAIG: Sure. Banilla manufactures a whole

1 bunch of devices.

2 THE COURT: Okay. That's fine.

3 MR. CRAIG: Right. And so we -- this is a device
4 that we have never looked at. We never had an opportunity to
5 review. Nick Farley got ambushed with this, and so it is a
6 little unfair, in our opinion, but that's neither here nor
7 there. What the problem is, I think, is this moot, right?
8 Should we even need to address it. Is this starting point
9 within the finite pools issue, and that is something that
10 essentially -- or the randomness in the software code with
11 regards to where does the machine determine the starting
12 point and the finite pools. Those are not opinions that Nick
13 Farley will offer at trial.

14 That is something that he expressly stated during
15 his deposition he had not looked into, and he had not formed
16 any opinions about those things. And then he was pressed
17 further by Mr. Finneran, and trying to be helpful, he said,
18 you know all I really know about that comes from what I
19 believe I read from Banilla, 30(b)(6) witness, and then he
20 elaborated on what he could recall. But he never made those
21 his opinions, because they aren't. What he stated was, I
22 don't know.

23 And so in our -- this is a different area -- but in
24 our responses to Daubert motions, we specifically stated in
25 response to their request that Nick Farley not be allowed to

1 say those things. We agreed. Those are not opinions that he
2 is going to give. We also agreed that whether there is an
3 element of chance is a legal matter, and you know, be removed
4 from Stacy Freidman not to be able to say those things. We
5 also said to the extent Stacy won't do it. Our expert won't
6 either.

7 He did testify that, in his opinion, he doesn't
8 believe chance plays a role or is involved in the devices,
9 but in my opinion, that is a legal conclusion, and it is an
10 ultimate legal conclusion in this case, and both parties seem
11 to agree that that is something that experts -- and the
12 Eighth Circuit also agrees -- that that's something the
13 experts should not testify to.

14 So I think when you combine those two things, this
15 is an absolute nonissue, and then you throw in the fact that
16 this was filed in the wrong District, based on Rule 37(a)(2),
17 because Nick Farley is not a party to this case.

18 THE COURT: And I understand that that would relate
19 to the motion to compel the witness.

20 MR. CRAIG: That's right.

21 THE COURT: But it does overlap with the Daubert
22 motion, which is properly in this District.

23 MR. CRAIG: Yes.

24 THE COURT: And so I think actually this Court has
25 reason and basis to consider the motion to compel when I view

1 it in its totality.

2 MR. CRAIG: I think that, yeah. I do agree, but to
3 the extent what they are actually asking for is for an order
4 for you to personally compel testimony of Nick Farley, and
5 overrule his objections based -- because they weren't my
6 objections. I didn't instruct him not to answer.

7 THE COURT: He is theoretically your witness. He
8 is a witness you are going to put forth, and he has refused
9 to answer questions in a deposition. Whether you directed
10 him or not, you have a witness who you are intending, I
11 gather, to put forth, to present expert testimony, that that
12 witness won't answer some questions. And if the Court
13 believes that those are relevant questions, I think he has to
14 answer them or he doesn't testify.

15 I'm not sure I necessarily have the ability to
16 order him to testify, or order him to violate what he
17 believes to be his confidentiality agreement. My remedy, in
18 my mind, is to exclude him.

19 MR. CRAIG: In total? Because these are very
20 specific limited things that he is frankly not going to offer
21 affirmatively as opinions.

22 THE COURT: But he can't just come in and say what
23 he wants to say, but not be questioned about other relevant
24 matters. So the issue becomes is it relevant to this overall
25 case. Mr. Finneran, or any attorney, would have the right to

1 question him. It would go to his credibility, his
2 believability, his background and experience. So they would
3 certainly have the right to question him about other matters.
4 You are just saying that you think that these aren't
5 relevant; is that right?

6 MR. CRAIG: Well, yeah, I definitely don't think
7 they are relevant, but I didn't instruct him not to answer,
8 and I think --

9 THE COURT: Well, it doesn't make a difference in
10 my mind --

11 MR. CRAIG: Right.

12 THE COURT: -- whether you instructed him or not.

13 MR. CRAIG: It does under the rules, I believe,
14 your Honor, and but it's --

15 THE COURT: It does in some sense, but in others,
16 it doesn't in the sense that he is your witness.

17 MR. CRAIG: I understand that.

18 THE COURT: You are putting him forth as an expert,
19 and he is refusing to answer questions.

20 MR. CRAIG: I agree with you that those are things
21 that are facts. I think the distinction is is the Federal
22 Rule says that if you want to move to compel Nick Farley to
23 say a thing, you have to move in the District where the
24 discovery is taken, because --

25 THE COURT: I understand, but do you understand my

1 point is it overlaps with the Daubert motion.

2 MR. CRAIG: I agree -- I agree, but if he is here
3 present, and he is testifying, and he does not -- and he
4 takes that stand, and he is clearly in your personal
5 jurisdiction, and then he refuses to answer, which if you
6 direct him to answer and overrule his objections, based on
7 what Banilla's confidential agreement says, I have no reason
8 to believe that Nick Farley won't answer those questions,
9 right.

10 The problem today is that Nick Farley is not a
11 party, and what they are asking for is a motion to compel
12 Nick Farley, who is not a party. Nick Farley is not Torch.
13 Torch is not Nick Farley, right -- to do a thing in Las
14 Vegas, show up, and overrule his objections. I can't. And
15 regardless of what you say today, or you order me to do, I
16 can't -- I have no authority over Nick Farley to get him to
17 testify a certain way. I can reproduce him.

18 THE COURT: I assure you, I'm not going to order
19 you to tell him to testify.

20 MR. CRAIG: Yeah.

21 THE COURT: I may say that he is not going to be
22 allowed to testify.

23 MR. CRAIG: In total? I mean, that would be a
24 complete -- because that is.

25 THE COURT: He can't pick and choose what he is

1 going to testify about.

2 MR. CRAIG: He is not picking and choosing. He has
3 what he believes is a legally binding agreement that would
4 prohibit him from doing a thing. So you are going to have to
5 order -- you going to order that you do not believe that his
6 objections -- his objections, not mine -- his objections, not
7 Torch's, were meritless, and that he nonetheless has to give
8 that testimony, right?

9 And I don't have authority to do that, and I
10 believe under Rule 37, this is the wrong venue, as a matter
11 of fact, and --

12 THE COURT: On the motion to compel, I agree.

13 MR. CRAIG: On the motion to compel, yeah.

14 THE COURT: I agree with that.

15 MR. CRAIG: Okay. So that's why today for the
16 motion to compel, I think it has to be overruled and denied,
17 that's it.

18 THE COURT: Okay. Anything you want to tell me,
19 Mr. Finneran?

20 MR. FINNERAN: Yes, your Honor. You covered some
21 of the bases, so I can skip through a lot of this. I think
22 you understand the issue. I just want to point this out to
23 the Court, this is sort of what alerted us to this problem is
24 that we received a report that is among the reports that
25 Mr. Farley said would be his opinions in this case, where

1 Mr. Farley included the highlighted sentence. The first
2 outcome selected from each predetermined finite pool is
3 selected indiscriminately from a table of predetermined
4 indices.

5 we have located another report of Mr. Farley's
6 containing nearly the exact same sentence for another Banilla
7 device, not the same device, but the sentence is exactly the
8 same, except for the word "randomly", and so we had our
9 expert investigate this question. I am going to ask --

10 THE COURT: You are going into the merits of all of
11 this.

12 MR. FINNERAN: Yeah, I know.

13 THE COURT: I need to get to the heart of the
14 matter.

15 MR. FINNERAN: I got it. So as long as we are all
16 clear on what the testimony is.

17 THE COURT: But this is testimony about a Banilla
18 Game --

19 MR. FINNERAN: So, your Honor --

20 THE COURT: -- device.

21 MR. FINNERAN: So Banilla is the manufacturer of
22 the devices.

23 THE COURT: I understand.

24 MR. FINNERAN: And each of the devices has a
25 version number. So this one is 3.2 and a bunch of other

1 digits after it. So my client, Mr. Turntime, years ago was
2 able to purchase a device with one such model number.

3 On November 6th -- and this should follow disclosed
4 his reports to us -- we learn that that model number, in
5 fact, matched one of the five devices at that point Torch
6 disclosed to us, as being among the devices marketed in
7 Missouri and analyzed by Mr. Farley. So once we knew that,
8 we now know we have the same machine that Mr. Farley
9 analyzed, and we looked at it, and we found that the
10 statement about being discriminate probably wasn't
11 inaccurate, because there were random functions in that
12 device.

13 As you know, we then moved to -- I got a deposition
14 of the manufacturer. It is on the screen here. It is where
15 the manufacturer confirmed that information, and under Rule
16 -- you know -- under Rule 26, once Torch knows now that his
17 testimony on this point is incorrect, they should have a duty
18 to supplement and correct that testimony. And that's the
19 first thing I asked from Mr. Craig was will he simply correct
20 the testimony to say there are random functions.

21 Quite obviously, they don't want to do that,
22 because then that makes their case much more difficult to try
23 to say these are not games of chance. And of course, that
24 includes not just information in the report, but the
25 information given during his deposition.

1 So I'm turning to the question of are we in the
2 right place for this motion, and with respect, your Honor, I
3 believe we are. So under Rule 30, which is one of the
4 grounds of which we base our motion, what we are seeking is a
5 second deposition of Mr. Farley. And in the event that a
6 person has already been deposed, then we must obtain this
7 Court's leave to depose Mr. Farley again.

8 That's the remedy I requested from Mr. Craig in
9 which he -- after we were not getting the supplementation,
10 and that was refused. So Mr. Craig's argument is that
11 37(a)(2) means that we should have brought this motion in
12 Nevada. But what it says is that a motion for an order to an
13 nonparty must be made where the discovery is or will be
14 taken. And we don't have to depose Mr. Farley in Nevada.
15 Mr. Farley is their retained expert witness. We can require
16 him to appear in this District to sit for a deposition.

17 That is the usual -- you know -- under 26, it says
18 that he has to sit for a deposition, and we don't have to
19 comply with Rule 45, and --

20 THE COURT: Slow down a little.

21 MR. FINNERAN: Sorry. And get within a hundred
22 miles of his residence. He is an expert -- retained expert
23 witness, and we, you know, we have dug hard today to try to
24 find cases on it. But here, we found a case that tells us
25 the typical rule that we all know that a party seeking

1 discovery may set the place where the deposition will take
2 place.

3 And we would ask the deposition to be taken in this
4 District, which is not a Rule 45 issue, where we have to be
5 near the home of the deponent. This is a retained expert
6 witness. We have a right to depose under Rule 26. Courts
7 repeatedly -- and that we have two slides on this, which I'll
8 be happy to give the Court later -- that tells that Rule 45
9 subpoenas are not appropriate for retained experts. If we
10 had tried to go down that route, we may be arguing the
11 opposite thing that we should have come to this Court first.

12 And frankly, your Honor, it doesn't make much sense
13 to require us to go to Nevada to file this motion, because
14 that's simply a venue provision, as this Court acknowledged a
15 few moments ago, it has jurisdiction over this issue, and if
16 we go back to Nevada, then Nevada will have the ability to
17 transfer the motion back here, because this is the Court
18 where the action is pending. We would be asking to do that
19 anyway.

20 So frankly, we don't think that this argument,
21 which we only saw last night, and we'll be happy to brief
22 further for the Court, in any way precludes the Court from
23 ruling on the motion to compel. And Mr. Farley, from our
24 prospective, is their retained witness. The Court has the
25 power to compel him to testify. The objections --

1 THE COURT: Let me ask you this.

2 MR. FINNERAN: Yes, your Honor.

3 THE COURT: Is the only issue this issue of the
4 language in those two reports that differ?

5 MR. FINNERAN: Not just the language, your Honor,
6 but the underlying facts reflected by that statement, because
7 this is a very important fact in the case. Did they say we
8 won't offer that opinion. That's how the starting entries
9 are selected. But that opinion goes to Mr. Farley's ultimate
10 conclusion, his opinion, that chance plays no role in the
11 operation of the games. That's what he says in his report.

12 well, if it is not true, as Banilla has told us, as
13 our expert has established, although they wanted to exclude
14 that as well, and as the evidence that we have provided
15 shows, then that undermines the basis for his ultimate
16 conclusion.

17 THE COURT: How long do you need to file a reply to
18 the response as it relates to this issue?

19 MR. FINNERAN: It would be no problem. I can do
20 Friday, if you need me to do Friday.

21 THE COURT: I mean, again, the whole reason for
22 doing this is that you wanted an expedited schedule. We have
23 given you an expedited schedule. I'm trying to make sure
24 that we can stick with that.

25 MR. FINNERAN: We will do it by Friday.

1 THE COURT: Okay. All right, okay, I don't really
2 want to get too much more into this. If there is something
3 else very briefly that you want to tell me.

4 MR. CRAIG: Yeah, I mean, hopefully very briefly.
5 We don't believe that this testimony is relevant. You let
6 him get into the reason why they believe this is relevant and
7 somehow --

8 THE COURT: Tell me briefly why it is not relevant.

9 MR. CRAIG: Yeah. Because this is, in their best
10 case scenario, this is a software function that happens, as
11 they say it, before any player can even press play on a
12 single device, right? So this is like saying there is a
13 regulation that says you are going to be held in contempt if
14 you don't have -- every vehicle has to have a steering wheel,
15 right, but then before you are saying okay, well, every
16 assembly line car now that doesn't have an --

17 THE COURT: The issue is, as I understand it, is
18 whether or not it is a random selection.

19 MR. CRAIG: But if it is just in the starting point
20 for the very -- this is so minute -- it is -- we are talking
21 about how the software selects the very first initial
22 starting point in the finite pool of repeating
23 finite outcomes.

24 THE COURT: Doesn't that affect who wins and who
25 loses?

1 MR. CRAIG: No, it doesn't, because it is set
2 before any player pushes play. So before a player plays the
3 device, before a player pushes play, all of that is fixed.
4 Everything is fixed. When the player presses play, it is all
5 fixed. It is not random anymore.

6 THE COURT: All right, you've got --

7 MR. CRAIG: I mean, secondarily, this is testimony
8 that we were ambushed with about a device that is not a Torch
9 device. It is a irrelevant, and we have not had an
10 opportunity -- Farley has not had an opportunity to look at
11 the device. All we are hearing is testimony from Rich that
12 they are identical, because they believe it is, and --

13 THE COURT: It does have a do with a Banilla Game
14 device, and it is -- what's the evidence that it is the same?

15 MR. FINNERAN: So in addition to the fact that they
16 share the same model numbers, 3.2 etc., the supplemental
17 report of Mr. Friedman demonstrates that he performed the
18 same analysis Mr. Farley did, which is called a CheckSum,
19 which basically is a way of confirming that two devices
20 contain the same executable files, and we confirmed they did.
21 I will just --

22 THE COURT: Okay. I'll give you until Friday to
23 file a response to -- a reply to the response.

24 MR. FINNERAN: Yes, your Honor. Sure.

25 MR. CRAIG: We filed --

1 THE COURT: I have heard enough about it. Well, go
2 ahead.

3 MR. CRAIG: Just can I have one more tiny thing --
4 is we filed a motion to strike the supplemental report of
5 Stacy Friedman. And so if that's gone, this is totally
6 irrelevant.

7 THE COURT: Okay. All right, I want to give you a
8 chance to tell me about your motion to compel.

9 MR. CRAIG: Thank you, your Honor. Okay, so
10 Defendant's moves to compel on just a couple of issues. The
11 first is is fairly general in that we were interested in
12 knowing a little bit more about TNT's production, and how
13 they went about looking at documents.

14 They have provided now some additional information
15 regarding that process, or lack thereof, to collect and
16 review potentially responsive documents, which we do
17 appreciate. But it doesn't alleviate my concerns that TNT's
18 corporate representative testified, and that he and others
19 made judgment calls regarding relevant and responsiveness,
20 which I believe that they necessarily understand what that
21 means within the scope of the Federal Rules. And then also
22 when I deposed Turntime for his 30(b)(6) deposition, he told
23 me that yes, he alone, and his people alone made judgment
24 calls about what was responsive, and then it was turned over.
25 And when he did that, he said, I sent them quote "thousands

1 of documents."

2 And then in this case, we have been -- have
3 produced us approximately 600 documents, many of which are
4 highly duplicative, some e-mail chains, sometimes there is
5 complete duplicates. And the aside from Mr. Turntime's
6 testimony, now TNT's own opposition brief raised additional
7 questions regarding TNT's document review production process,
8 specifically on page four of TNT's memorandum in support at
9 footnote two.

10 TNT stated, "Although Defendants previously had
11 brought counterclaims against TNT that might have supported a
12 more searching inquiry into TNT's own business records,
13 Defendants have dismissed those claims." This footnote is
14 literally the first time -- it was yesterday was the first
15 time that TNT indicated to the Defendants that otherwise
16 responsive documents were being withheld from Defendants
17 based on TNT's belief that the simple fact Defendant's agreed
18 to dismiss their counterclaim somehow excused TNT's full
19 compliance when responding and objecting to Defendant's
20 written request for production.

21 Defendant's written request for production were not
22 promised or contingent upon Defendant's counterclaims, and
23 despite Defendant's willingness to voluntarily dismiss those
24 counterclaims for a number of reasons --

25 THE COURT: Mr. Craig, let me just interrupt you.

1 MR. CRAIG: Sure.

2 THE COURT: What are you asking me to do as it
3 relates to this motion to compel?

4 MR. CRAIG: Yeah, well, if it is true, for one
5 thing, if it is true, they have withheld documents that would
6 otherwise be responsive to our original and only RFP's in
7 this case based on a fact that dismissing our counterclaims
8 somehow limited and narrowed the scope of what they did agree
9 to give us in their responses. We need those produced, your
10 Honor.

11 There was no agreement. We never heard that before
12 footnote two, and we have other basis like unclean hands, our
13 own defenses. We believe that this case was brought for
14 improper purposes and improper grounds. So we are entitled
15 to a very broad discovery. These are very serious claims
16 against my clients, and we are entitled to defend ourselves.

17 So I would ask, based on their own footnote, saying
18 that it appears they withheld potential responsive documents
19 after we agreed to dismiss counterclaims, that they produce
20 the documents they agreed to produce to us.

21 THE COURT: Okay.

22 MR. CRAIG: Secondly, there is a waiver of
23 argument, your Honor, and a waiver of argument here is fairly
24 broad. Frankly, in our motion -- in our brief, we pointed
25 out multiple examples of communications between TNT's

1 president and owner, and numerous non-parties, and third
2 parties, mostly Mr. Turntime's friends and business
3 acquaintances from MeloMelo (phonetically), and his trade
4 association, where they span approximately four years from
5 about the middle of 2019 until a few days before this case
6 was filed.

7 THE COURT: Let me stop you for just a moment. Mr.
8 Finneran, have you produced a privilege log, because it does
9 appear to me that you are asserting a privilege as it relates
10 to communications between Mr. Turntime and attorneys.

11 MR. FINNERAN: So your Honor, as you actually see
12 in our response we have attached. At the outset of
13 litigation, there was an agreement reached between myself and
14 Mr. Craig that to the extent the communications are
15 communications between Mr. Turntime, TNT, on the one hand,
16 and then we each provided another list of attorneys that we
17 basically then dispute were, you know, attorneys who would --
18 the privilege would cover. That we would not -- either party
19 -- produce a privilege log of those communications.

20 In fact, I believe at this point, neither party has
21 produced any privilege log to the other side based on that
22 agreement.

23 THE COURT: I guess the question that's being
24 raised, and I think it is accurate, is to the extent that
25 e-mails were forwarded or sent to -- whether it was

1 legislatures, prosecutors, other people that included
2 attorney-client communications, the privilege would be
3 waived.

4 MR. FINNERAN: The reason Mr. Craig has those
5 e-mails is because if there was an actual waiver of a
6 specific communication -- so like you said, it was forwarded
7 to a third party, we did -- we have not claimed privilege
8 over those or we have produced those documents.

9 Mr. Craig, as I understand, is seeking is on the
10 basis of Mr. Turntime having forwarded what we view as a
11 small set of communications that reveal some communication he
12 may have had with an attorney, that that subjects the
13 entirety of his communications relating to the subject matter
14 of this litigation to a waiver.

15 And so, for example, communications with myself
16 prior to the initiation of this lawsuit, I understand, so --

17 MR. CRAIG: I'm looking -- I'm not -- go ahead.

18 THE COURT: Okay, go ahead.

19 MR. CRAIG: Yeah. So I don't believe that there
20 will be communications with Mr. Finneran would be the
21 communications that we would be after here. I never saw an
22 example where I think Mr. Finneran had a communication that
23 was waived.

24 what all of these communications -- almost all of
25 them were -- were not just forwarding on necessarily an

1 e-mail. This is Mr. Turntime saying like this is what I'm
2 going to tell my counsel. This is what our game plan is.
3 This is what my counsel is telling me how we are going to go
4 after and "kill Torch".

5 These are broad waivers about a subject matter that
6 relates directly to my client and directly to this case.

7 THE COURT: But let me just ask you this --

8 MR. CRAIG: Sure.

9 THE COURT: -- do you agree that there was an
10 agreement at the beginning of the case that neither side
11 would produce a privilege log as it relates to communications
12 between certain attorneys and either Torch or TNT; is that
13 correct?

14 MR. CRAIG: That was an agreement very early in
15 this case before we saw the documents where there was a very
16 clear waiver with a broad subject matter. That frankly, I
17 don't need a privilege log to get an order that says if it is
18 related to this subject matter, produce it, but yes before --

19 THE COURT: You know, what you are actually just
20 asking me to do is order that okay go back through, and if
21 you waived attorney-client privilege, then send it to -- it
22 is discoverable.

23 MR. CRAIG: It would be under the preexisting case
24 law.

25 THE COURT: Again, without a privilege log, I can't

1 identify certain communications.

2 MR. CRAIG: We would ask that you would order them
3 to produce a privilege log to the extent that it relates to
4 those specific topics then, your Honor, because I couldn't
5 have known if they waived privilege in this manner by talking
6 with third parties many many times. When we first -- we are
7 trying to narrow the scope of this expedited case, so we
8 didn't have to produce broad privilege logs.

9 THE COURT: Okay. Mr. Finneran, you are telling me
10 in any case where there is an e-mail that is between
11 Mr. Turntime, an attorney, and it is forwarded to a third
12 party, you have produced all of those e-mails, all of those
13 documents.

14 MR. FINNERAN: Yes, your Honor. There are -- I
15 will say there are two e-mails that I need to discuss with
16 Mr. Craig, because we believe that another client was on the
17 e-mails, and I believe there is two of those. Those have not
18 been produced. That's probably what our privilege log would
19 constitute, if we have one on this case on those issues, but
20 those are the only two -- just in candor, I learned about
21 these the other day, and I want to have a chance to discuss
22 it with Mr. Craig, but if those -- with those two aside, if
23 there was a circumstance where a third party was on the
24 communication, or a communication between TNT and one of the
25 attorneys was forwarded to a third party, we produced that

1 communication. And I'll consult with Mr. Craig about these
2 other two e-mails, I think I likely produced them as well.

3 MR. CRAIG: Your Honor, the scope of a privilege
4 waiver is the subject matter. Now, they cite to rule --
5 Federal Rule of Evidence 502, but that doesn't apply here,
6 because Rule 502 only applies if it is a waiver that was in
7 the context of litigation, either State or Federal, under A
8 or C, I believe, or if it was inadvertent.

9 None of those things exist here, and the specific
10 -- the specific comments by the committee, the Rules
11 Committee, specifically say that 502, which was supposed to
12 just -- really, it was targeted towards us, moving into a new
13 digital era, and everybody has millions of documents, and you
14 can't hold house on all of them, and so the old rule of
15 inadvertence subject -- it used to be if you inadvertently
16 produce, purposely, with an attorney-client privilege, a lot
17 of courts will say you have waived all privilege on that
18 subject matter, but if you did that in response to discovery.
19 502 was a specific limited waiver only to specific instances
20 that aren't covered here, when you are producing documents in
21 the context of litigation. That's not what happened here.

22 They are not saying they inadvertently produced
23 these -- the actual statements, the communications between
24 Mr. Turntime and the third parties, they were extrajudicial.
25 This was him going out and telling people, you know, these

1 are my plans. Do you have any ways to help me get Torch.
2 when you operate in that, right, and it is not a specific
3 exception, how it is defined by the Rules Committee. It is
4 an exception to traditional rules of subject matter waiver,
5 right.

6 If you are not within those exceptions, you are
7 right back in the same case law that has existed and
8 continues to exist about subject matter waiver in the Eighth
9 Circuit and abroad, which is -- you talk about an issue
10 voluntarily with third parties, and you have now waived
11 privilege on the subject matter, and that's where we are at.

12 So the fact that he is saying we produced all
13 communications, well, that's irrelevant, because what we know
14 is these were broad conversations, and as you probably know,
15 very rarely do you actually get documented evidence of these
16 types of waivers, but we have many, and they span four years.
17 So this is also in the context of a very very limited
18 production to us.

19 THE COURT: So what are you asking me to do?

20 MR. CRAIG: I mean, I think, as you pointed out, I
21 don't have a privilege log. That would be helpful. So I
22 think the starting point is ordering them to produce a
23 privilege log of communications would be good. I think they
24 have waived privilege, though, on the subject matter that is
25 our strategy related to the litigation to Torch prior filings

1 in this case. I'm not looking for Mr. Finneran's
2 communications with his client, because I have not seen any
3 instance where Mr. Turntime was specifically talking about
4 communications with Mr. Finneran, but you literally see in
5 the documents, if you look at our exhibits to this motion,
6 you see the light bulb moment in Mr. Turntime when he -- and
7 I think it is July or June of 2019 -- where a light bulb goes
8 off where he is talking to all of these third parties about
9 how he is going to go after Torch, and the light bulb went
10 off, and I'm going to use the courts, and I have talked to my
11 lawyers about it, and here is what I think, and here is what
12 they think, and do you guys have any other, you know,
13 opinions, and then that carries on a conversation between all
14 of these people for four years.

15 THE COURT: All right. Mr. Finneran, it is clear
16 to me that there were communications between your client and
17 third parties that discuss here is what my lawyers tell me.
18 Here is what I'm planning on doing. I think there is no
19 privilege as it relates to those communications. I think
20 those are going to have to be turned over.

21 I'm going to -- how long do you need to produce a
22 privilege log?

23 MR. FINNERAN: If I understand correctly, your
24 Honor, you were asking if we were to log all of the
25 communications that we previously agreed with Mr. Craig not

1 to have to log, how long would that take -- do you know how
2 long? I think that part of that is confusion, I guess so,
3 and since he is not interested in e-mails with my firm, so I
4 guess -- can you clarify what you are interested in?

5 MR. CRAIG: Yeah. Almost all of the communications
6 that seem to relate to this, relate to -- as you know, there
7 is 2019 -- there is the November 2019 case that was filed in
8 Crawford County by TNT. So it is really Mr. Elkin -- what is
9 it, Elkins?

10 THE COURT: Kistner.

11 MR. CRAIG: Elkin Kistner?

12 THE COURT: Yes, sir.

13 MR. CRAIG: I think all of those communications it
14 is really Elkin Kistner's law firm communications with
15 Mr. Turntime.

16 MR. FINNERAN: So, your Honor, I'm not sure if we
17 can figure out as we sit here today what the volume of those
18 communications is. We could do it expeditiously, but I would
19 like to be heard on why we don't believe that, you know,
20 assuming that there were the communications you are
21 referencing that that would create a subject matter waiver
22 over communications that were not forwarded to any third
23 parties. So if I can be heard on that, I'd appreciate it.

24 THE COURT: Well, go ahead.

25 MR. FINNERAN: So, your Honor, would you like me to

1 approach the podium or sit here?

2 THE COURT: You are probably fine right there as
3 long as you speak into the microphone.

4 MR. FINNERAN: Okay. So your Honor, focusing on
5 the privilege issue first. So again, we don't dispute that
6 when Mr. Turntime forwards an e-mail to a third party, that
7 he waives a privilege over that e-mail. What Mr. Craig is
8 now saying is that if you reveal anything outside the context
9 of the litigation to somebody else about a communication
10 involving the attorney, now you have to reveal all of your
11 communications with that attorney on that same subject
12 matter. And as we have -- we haven't had the chance to fully
13 speak to you about this, but there is cases cited in our
14 brief in response that demonstrate that that rule only
15 applies when it is in the context of litigation, and it is
16 sort of the sword and shield problem where parties
17 selectively revealing something to use to its advantage,
18 while then gaining the advantage of the privilege on the
19 other side.

20 That's clearly not what is taking place here.
21 These were not revealed in the context of any litigation, and
22 we don't intend to offer any of these communications as
23 evidence in our case. So it is --

24 THE COURT: Whether you intend to offer them or not
25 is not the relevant issue.

1 MR. FINNERAN: Correct.

2 THE COURT: The issue is to the extent that your
3 client communicated with third parties, and included
4 attorney-client communications or advice, or planning, there
5 is a waiver as to all of those communications, and the
6 subject matter of those communications may also be waived.

7 So I am a little bit concerned when you start
8 talking about the Crawford County case and communication with
9 Mr. Kistner. I don't see how they necessarily waived
10 privilege as it relates to all aspects of the Crawford County
11 case. I just don't see that.

12 Again, I do agree that to the extent that there
13 were subjects that were discussed in communications with
14 third parties about communications with attorneys, that it
15 waives the privilege as it relates to that subject. So to
16 the extent that he might be saying, well okay, if you change
17 the law in this way, that will help us, or urging a
18 prosecutor to prosecute someone, and that your attorney says
19 that it is illegal, or whatever. I mean, it waives the
20 privilege as it relates to those subjects so.

21 MR. FINNERAN: Your Honor, I understand your
22 inclination there, but I think the concern is that if the
23 Court's reasoning is that merely because I disclosed
24 something specifically, and an attorney told me outside the
25 context of the litigation that I can waive the privilege,

1 then I think that's opens a very broad rule. For example, as
2 we said in our briefing, in this case Mr. Miltenberger
3 testified that the decals that they place on every Torch
4 device was drafted by a lawyer. So they have obviously
5 waived the privilege over decal.

6 Does that mean I now get to go and get every
7 communication of the lawyers in advance of that.

8 THE COURT: I agree with you, it is not that broad.
9 I agree with that. But it certainly relates to any
10 communication that is forwarded to a third party, whether it
11 is a friend, or again, the categories of people that we have
12 talked about that it appears that your client was
13 communicating with. Those communications are -- there is no
14 attorney-client privilege as to that.

15 I'm going to want a privilege log on Friday. You
16 can tell me how long it will take to produce that privilege
17 log. You are going to file your reply as it relates to Nick
18 Farley?

19 MR. FINNERAN: Yes, your Honor.

20 THE COURT: Well --

21 MR. FINNERAN: And to be clear, we are not being
22 asked to log any communication my firm has had, only
23 communications that Mr. Kistner and his firm may have had
24 with Mr. Turntime. It will take us a lot longer if we have
25 to log our communications with our firm.

1 THE COURT: You are not asking for communications
2 with Brian Cave, correct?

3 MR. CRAIG: Certainly nothing after the filing of
4 the case. I don't think that I am. I don't think that I
5 have seen any reason to believe there is a waiver with
6 respect to Mr. Finneran's firm.

7 THE COURT: Okay. So I think the answer is no as
8 it relates to Brian Cave, and I don't know whether or not
9 there are other law firms other than Mr. Kistner's law firm
10 who have provided advice or direction to your client to TNT.

11 In any event, I want to know by Friday how long it
12 will take you to put together the privilege log. I
13 understand that that could be voluminous. I don't know how
14 much of an issue. So again, by Friday, you are going to give
15 me the reply on Nick Farley.

16 what I'm going to order with regard to
17 Mr. Miltenberger is that he sit for another deposition for
18 two hours. No more than two hours. That's what you are
19 going to have. I want you to try to come up with an
20 agreement. I agree that it is based on the facts as opposed
21 to legal opinions, but I also understand that that line is
22 not a clear line necessarily. So I need you all to meet and
23 confer and see if you can agree on that.

24 Honestly, I'm going to tell you have to meet and
25 confer on all three of these issues and try to come to some

1 agreements. Again, I'm going to try to keep pushing you to
2 move forward.

3 As it relates to Mr. Miltenberger, I'm granting the
4 motion to compel as it relates to him, and if he answers
5 everything "I don't know" again, I'm going to impose
6 sanctions. So you just need to be aware of that. Having
7 said that, again, I think two hours it is enough time for you
8 to get those questions answered that are fact-based
9 questions. So I'm going to ask that you meet and confer and
10 try to reach an agreement. So that's the issue with regard
11 to Miltenberger.

12 With regard to Farley, again I'll get your reply on
13 Friday. We'll get you an order as quickly as we can as it
14 relates to Farley. I do think you have an issue about the
15 motion to compel. I understand your argument, but I
16 frequently get miscellaneous matters filed here, motions to
17 compel on out-of-state litigation. So it is not unusual.

18 MR. FINNERAN: For expert witnesses, that would
19 surprise me, because we have looked everywhere.

20 THE COURT: They are miscellaneous matters that are
21 filed. It is --

22 MR. FINNERAN: For Rule 45 subpoenaed witness,
23 yeah, we found a thousand of those and very few on this
24 expert issue.

25 THE COURT: It is hard to find those miscellaneous

1 matters, because the Clerk's Office opens them and closes
2 them on the same day. So in any event, I'll give you an
3 opportunity to file that reply on Friday, and then I'll enter
4 an order as it relates to all three motions to compel.

5 But on Friday, I need you to give me proposed
6 language on Miltenberger on the topics and the timeframe on
7 the privilege log.

8 MR. FINNERAN: Okay. I have not yet been heard yet
9 on the first topic in the motion to compel meaning our
10 collection process for Mr. Turntime and TNT. Do you have any
11 ruling on that, or would you like oral arguments?

12 THE COURT: I just want you -- I mean, really what
13 you are saying to me is there is this incredible disparity
14 which --

15 MR. CRAIG: Kind of. I think that would be true
16 until we got the reply, your Honor, and footnote two is very
17 problematic. Prior to seeing footnote two, yeah, basically I
18 needed to come to you, tell you there is a disparity. If you
19 agree, then that's the end of the inquiry. I'm not calling
20 Mr. Finneran a liar. I think there is a disparity between
21 the broad questions that we asked, because we had to, because
22 we only got one shot at it, and the lack of objections in the
23 600 documents that we got produced, especially when my client
24 has spent hundreds of thousand of dollars and plus 10,000
25 plus 12,000 documents.

1 So, but footnote two is problematic in that it sure
2 seems like they have made some sort of judgment call.

3 THE COURT: I don't know --

4 MR. FINNERAN: Your Honor, I can clarify what I
5 have mentioned in footnote two. So first of all, I am -- as
6 we said in our filing, we believe we have done a diligent
7 search. We are not aware of any document we withheld, and
8 certainly footnote two is not meant to suggest that we have
9 withheld a document.

10 I was saying that -- well, what was said there is
11 the idea of a more searching inquiry, meaning that if, for
12 example, there were requests brought that related to those
13 counterclaims, perhaps we would have had to do more, but by
14 no means was I meaning to suggest by that that we have
15 withheld a document that is not either privileged or
16 nonresponsive. And the fact that Mr. Turntime did turn over
17 an excess of a thousand documents to us, that we have
18 produced a smaller number of those reflects that --

19 THE COURT: I'm not worried about necessarily just
20 a disparity, but I want to make sure you have done a complete
21 thorough search, and I think to the extent that your client
22 is exercising judgment about what is relevant and what isn't
23 relevant is concerning to me. I think you need to make sure
24 that there has been a thorough, complete search, because the
25 last thing you are going to want to have happen is for them

1 to find a document you have not produced it. We are in the
2 middle of trial, because you are not going to want to hear
3 what I'm going to do as a result of that.

4 MR. FINNERAN: Of course, your Honor, and I should
5 just clarify while we did -- Mr. Turntime consulted with me
6 and my colleagues before he conducted his search. We gave
7 him guidance as to what to look for, the kind of things to
8 do. He then produced a large volume of documents to us, many
9 of which were not responsive, which were duplicative, etc.
10 Our attorneys then reviewed those documents to confirm that
11 we would be producing and meeting our discovery obligation.

12 So as I sit here today, I'm very confident that
13 this issue has been going on for some time, and I have had
14 numerous conversations with my client to ensure that we don't
15 believe anything has been withheld. I will have another of
16 those conversations, and if we discover something we have
17 overlooked, I will turn it over to Mr. Craig without any
18 further intervention of this Court.

19 THE COURT: Okay. I mean, I know that there has
20 been a lot that has gone on between TNT and Torch in terms of
21 different matters. So it does somewhat surprise me if there
22 are only 600 documents that are responsive. So I would just
23 urge you to make sure you have done a thorough, complete
24 search, and disclosed any discoverable documents.

25 MR. FINNERAN: Yes, your Honor.

1 THE COURT: All right. So that's where we are at.
2 Again, we have a tight timeframe, a lot of things going on.
3 Just get those filings to me, and then we will get an order
4 out. Thanks for being here.

5 MR. FINNERAN: Thank you.

6 MR. CRAIG: Thank you, your Honor.

7 THE COURT: Okay.

8 (The proceedings concluded at 5:01 p.m.)
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1 REPORTER'S CERTIFICATE

2
3 I, Lisa M. Paczkowski, Registered Professional
4 Reporter, do hereby certify that I am a duly appointed
5 official Court Reporter for the United States District Court,
6 Eastern District of Missouri, and that the foregoing is a
7 true and accurate reproduction of requested proceedings had
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9 TNT Amusements, Inc., vs. Torch Electronics, LLC

10 In the event copies are made of the transcript
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13 Dated this 28th day of May, 2024.
14
15

16 /s/ Lisa M. Paczkowski
17 Lisa M. Paczkowski
18 Official Court Reporter
19 United States District Court
20 Eastern District of Missouri
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